IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-99

EVANSVILLE-VANDERBURGH AIRPORT AUTHORITY DISTRICT, ET AL., *Petitioners,*

v.

DELTA AIR LINES, INC., ET AL., *Respondents.*

On Writ of Certiorari to the Supreme Court of Indiana

BRIEF FOR THE RESPONDENTS

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Dated: December 27, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported unofficially at 265 N.E.2d 27 and is reproduced at A. 198-207.[1] Neither the Findings of Fact and Conclusions of Law nor the *nunc pro tunc* judgment of the trial court has been officially reported, and they are reproduced, respectively, at A. 134-157 and A. 189-197.

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[1] "A." refers to the printed Appendix filed in this Court under Rule 36.1. References to the original record are indicated by "R."

QUESTION PRESENTED

For reasons stated in the Argument, at p. 18 *infra*, the two questions posed by petitioners are more properly stated as one:

Does a municipal airport's exaction of one dollar for the act of enplanement by each commercial airline passenger constitute a violation of the Commerce Clause of the United States Constitution where the exaction is imposed directly on the passengers, 88 percent of whom are departing the airport into interstate commerce, without regard to any actual use they make of airport facilities, and where such passengers constitute a minority of all persons using such facilities?

STATUTES INVOLVED

U. S. Constitution, ART. I, § 8, cl. 3 (Commerce Clause) and Evansville-Vanderburgh Airport Authority District, Ind., Ordinance No. 33, Feb. 26, 1968 are set forth in Appendix A (pp. 49-52 *infra*).

SUPPLEMENTARY STATEMENT

A. Proceedings Below

Although petitioners' statement of the proceedings below is correct as far as it goes, it omits facts required to give an accurate picture of the procedural posture of this case. Plaintiffs Delta Air Lines, Inc., Eastern Airlines, Inc. and Allegheny Airlines, Inc. (respondents here) operate federally certificated commercial airline flights at the Evansville-Vanderburgh Airport (herein the Airport) and would be charged with collection of the tax on enplaning passengers imposed by Ordinance No. 33 of the Evansville-Vanderburgh Airport Authority District (herein the District); the other plaintiff-respondent, William F.

Wood, is a member of the class of persons who would be subject to the payment of the one dollar charge imposed by Ordinance No. 33. A. 135-137. In lieu of an evidentiary hearing, the parties filed a Stipulation of Facts (A. 42-97) with the trial court, which issued Findings of Fact and Conclusions of Law (A. 134-157) and, in due course, a judgment granting respondents a permanent injunction in this case (A. 189-197). If injunctive relief had not been granted below, the Ordinance would have taken effect on July 1, 1968.

Respondents' two complaints each challenged in separate counts the validity of Ordinance No. 33 on three separate constitutional grounds:

(1) Ordinance No. 33 imposes a burden on interstate commerce in violation of the Commerce Clause. A. 14, 108-09.

(2) Ordinance No. 33 interferes with the rights of passengers to travel among the several states. A. 14, 113-14.

(3) The burden of Ordinance No. 33 falls on an irrationally drawn class of persons, in violation of the Equal Protection Clauses of the Fourteenth Amendment and the Indiana constitution. *Ibid.*

These grounds were kept separate in the briefs of both parties in the trial court, and the trial court entered separate conclusions of law holding Ordinance No. 33 invalid on each ground. A. 154-55, 192-93. But petitioners completely ignored the right-to-travel issue in their briefs to the Indiana Supreme Court and treated only the Commerce Clause and equal-

protection issues. Respondents' brief in that court pointed out (at 13-16, 31-37) that, under Indiana procedural rules, petitioners had thereby abandoned the right-to-travel issue and that this abandonment required affirmance on that independent ground of the decision of the trial court. However, the Indiana Supreme Court's opinion neither addressed itself to the question whether the right-to-travel issue was properly before it, nor did it express any view on the merits of that issue. It also did not consider the equal protection issue, basing its decision solely on Commerce Clause grounds. The decisions of the two courts are discussed at pp. 10-12 *infra*.

B. Description of Ordinance No. 33

Ordinance No. 33 was enacted by the District on February 26, 1968 and would impose a levy of one dollar upon enplaning commercial airline passengers at the Airport beginning on July 1, 1968 but for the injunctive relief granted below. Each commercial airline is charged, together with its various agents and employees, with the responsibility of collecting the charge imposed by the Ordinance. The airlines are authorized to deduct six percent of all amounts so collected for the purpose of defraying their administrative costs in collecting the charge. The Ordinance exempts from the charge members of the U. S. armed forces and passengers whose flight terminates or requires an intermediate or temporary stop at the Airport. It is specifically stated in the Ordinance that the proceeds from the charge shall be allocated to the construction, improvement, equipment and maintenance of the Airport and its facilities for the "use . . . by all users thereof."

C. Application of "Use and Service Charge" Imposed by Ordinance No. 33

The charge imposed by Ordinance No. 33 would apply to passengers of all three of the respondent airlines, which are the only three commercial air carriers now transporting passengers to and from the Airport pursuant to Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board. A. 44. Two of the three respondent carriers, Eastern Airlines and Allegheny Airlines, are engaged exclusively in interstate commerce. The third, Delta Air Lines, is engaged in both intrastate and interstate commerce. *Ibid.* Approximately 88 percent of all enplaning commercial passengers at the Airport are interstate travelers bound for ultimate destinations outside the State of Indiana. A. 49.

Although the levy imposed by Ordinance No. 33 is described therein as a "use and service charge," the trial court reached findings of fact[2] that the charge bears no reasonable relationship to the actual use or nonuse of facilities at the Airport (A. 151) and that the operating incidence of the charge is solely on the act of enplaning upon a commercial airline at the Airport (A. 148). These findings are based on the parties' stipulation that the facilities of the Airport are available to, and are used by, large numbers of

[2] As the Supreme Court of Indiana observed, "The facts [in this case] are undisputed." A. 202. This Court generally will not re-examine a state court's findings of fact, *Grayson* v. *Harris*, 267 U.S. 352, 358 (1925), in the absence of a showing that a federal right has been denied below as the result of a finding unsupported by the evidence, or of a showing that a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *See Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927).

persons other than enplaning commercial airline passengers. A. 47-48.

It is stipulated that departing passengers on the flights of respondent airlines do make use of a number of facilities at the Airport. A. 46-47. However, these facilities are also available to other persons and may include air passenger service counters, waiting rooms, rest rooms, baggage facilities, taxi and car rental facilities, food and beverage facilities, barber shop and parking lots. *See ibid.* There was no evidence in the record to contradict the finding of fact of the trial court (A. 151) that the exaction imposed by Ordinance No. 33 bears no reasonable relationship to the use of these or any other facilities of the Airport by these passengers.

It is obvious also that the respondent airlines themselves make use of a number of facilities at the Airport for the taking off and landing of their aircraft.[8] A. 44. Nevertheless, these facilities also are available to other aircraft operators and include runways and taxiways, fuel storage areas, an approach lighting system and an instrument lighting system. A. 46-47. For some time the respondent airlines have been subject to various charges which are related to their use of the Airport, including rentals, landing fees and similar charges pursuant to lease agreements with the District. *See* A. 60, 137-42; Appendix C at pp. 55-57 *infra*. There was no evidence in the record to re-

[8] Based on 1967 figures, takeoffs and landings by commercial aircraft of respondent airlines account for only about 15 percent of all flight operations at the Airport. In 1967, there were 14,834 takeoffs and landings by respondent airlines, and 84,598 by other civil and military aircraft. A. 46-48. In the same year, commercial operations at the Airport resulted in 146,955 passenger enplanements and 145,142 passenger deplanements. *Ibid.*

fute the findings of fact (A. 151) by the trial court that the exaction imposed by Ordinance No. 33 bears no reasonable relationship to the use of these or any other facilities of the Airport by respondent carriers. Moreover, the trial court noted that the leases entered into between the District and each of the respondent airlines specifically provide that "[n]o rentals, fees, license, excise or operating taxes, tolls or other charges, except those [provided in the lease], shall be charged against or collected from directly or indirectly, the [airline] for the privileges of . . . transporting, loading, unloading, or handling persons . . . from or on the Airport." A. 142.[4]

The majority of persons using the facilities of the Airport are not subject to the charge imposed by Ordinance No. 33 and include enplaning passengers who are active members of the armed forces (A. 48) or who are temporarily stopping at the Airport after arrival by commercial aircraft en route to other destinations (*ibid.*); deplaning commercial passengers (A. 47); persons arriving or departing on non-scheduled or non-commercial aircraft (*ibid.*); persons sending or receiving air freight shipments (*ibid.*); persons meeting or seeing off commercial and non-commercial passengers (*ibid.*); and persons visiting the Airport to sightsee or to use dining, bar, car rental or other facilities (A. 46-48). This majority of persons not subject to the one dollar service charge uses many of the same facilities used by respondent airlines and their enplaning passengers. *See ibid.*

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[4] In addition to these state and local charges, respondent carriers are also subject to federal user taxes, some of which may be used to finance, through extensive federal grants, a number of developments at the Airport. *See* A. 82, 95-96; 49 U.S.C. § 1742(f).

It has been agreed by the parties, and confirmed by the findings of the trial court, that the only effective and practical method by which the respondent airlines can be assured every person boarding one of their aircraft at the Airport pays the one dollar charge imposed by Ordinance No. 33 is to publish this charge as part of or in addition to their rates for departure from the Airport. A. 50, 147-48. To accomplish this, the respondent carriers would incur costs and expenses in effecting rate changes and providing nationwide accounting and remittance procedures. The costs and expenses of effecting and maintaining these changes and procedures might or might not exceed the six percent collection fee permitted by carriers under the Ordinance. *Ibid.* The result may be to require every airline ticket agent and travel agent in the United States and abroad selling airline flights originating at the Airport to be familiar with the District's service charge procedures. *See* A. 50, 147-48, 152. Based upon the stipulation of the parties, the trial court found that the necessary accounting and remittance procedures, as well as the necessary notice of the charge to every vendor of respondent airlines' tickets, would impose a heavy burden upon the interstate commerce conducted by the airlines to the detriment of their business and air commerce in the United States. A. 152.

D. Airport Head Tax Cases in Other Jurisdictions

The case at bar is one of four similar cases brought in state courts to enjoin the enforcement of airport head taxes which sprang up across the nation in 1968 and 1969. *See Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* 111 N.H. 5, 273 A.2d 676 (1971), *prob. juris. noted,* Oct. 12, 1971, No. 70-212;

Northwest Airlines, Inc. v. *Joint City-County Airport Bd.*, 154 Mont. 352, 462 P.2d 470 (1970); *Allegheny Airlines, Inc.* v. *Sills*, 110 N.J. Super. 54, 264 A.2d 268 (1970) (appeal dismissed). In each of these cases the statute purported to impose a one dollar charge for each passenger boarding a commercial aircraft. Also in each case most of the passengers affected were traveling in interstate commerce, were covered by the charge without regard to any actual use of the airport facilities, and constituted a minority of all users of the facilities. The only essential difference in the four statutes is that in Indiana the charge is imposed directly on the passengers, and the carriers are directed to collect it, whereas in Montana, New Jersey, and New Hampshire the charge was, in form, imposed on the carriers which were authorized but not directed to pass it on to the passengers.

In every case, except the one in New Hampshire, the statutes have been held to be repugnant to one or more provisions of the Federal Constitution and declared invalid.[5] In the *Northwest* case the Montana Supreme

[5] In addition, at least four legislative proposals for similar head taxes have been abandoned in the face of opinions of state or local officials that they were unconstitutional for one or more of the same reasons. Opinion of Attorney General of North Carolina, CCH N.C. State Tax Rep. ¶ 201-329 (1968); Opinion of the Attorney General of the State of Hawaii, No. 69-7, CCH Hawaii State Tax Rep. ¶ 200-048 (1969); Opinion of the Attorney General of the State of Washington, CCH Wash. State Tax Rep. ¶ 200-304 (1962); Opinion of the City Attorney of the City of Los Angeles, Report No. 12 on Council File No. 108718, Sept. 12, 1962 (unreported). The California Senate on May 12, 1971 passed a bill, SB 211, to authorize the imposition of a head tax on commercial air passengers "for the privilege of using airport facilities to depart" from the airport, but this bill has been amended in the California Assembly to delete any reference to such a tax. See the table of recent airport head tax proposals and legislation in Appendix B at pp. 53-54 *infra*.

Court held that the head tax was repugnant to the right to travel, the Commerce Clause, and the Equal Protection Clause. The reasoning and result of that case were expressly adopted by the New Jersey court in *Allegheny*. As indicated at pp. 3-4 *supra*, the Indiana Supreme Court invalidated the head tax in the present case solely on the basis of the Commerce Clause without reaching the other two issues. In the *Northeast* case the New Hampshire Supreme Court disregarded the opinions of the other three courts, as to the Commerce Clause issue, on the theory that the enplanement of passengers subject to the tax is a wholly *intrastate* event and that, in any event, the tax was a valid user's fee. 273 A.2d at 678. This Court has noted probable jurisdiction to review the decision in *Northeast*. Docket No. 70-212.[6]

E. Decisions Below

1. *The trial court* held Ordinance No. 33 invalid on all three constitutional grounds specified in respondents' complaints and entered specific conclusions of law holding that (i) the Ordinance, not being related to or apportioned according to the use of facilities at the Airport, constitutes an unreasonable burden on

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[6] The Court accepted jurisdiction in *Northeast* on the same day (October 12, 1971) as in the present case. The briefs for the two cases are to be filed at the same time, and it seems reasonable to believe that they will both be set down for argument on the same day. Since the two cases involve many similar arguments, particularly as to the Commerce Clause, the attorneys for the airlines (who are nearly identical in each case) have attempted to avoid unnecessary repetition of material in this brief that was covered in the Brief for Appellants filed by them in *Northeast*. Even so, there will necessarily be some duplication between the airlines' briefs in the two cases in the interest of clarity and orderly presentation.

interstate commerce (A. 154); (ii) the Ordinance is invalid as an intrusion upon the exclusive power of the Federal Government to regulate those aspects of interstate commerce requiring uniform national regulation (*ibid.*); (iii) the Ordinance violates the right to travel and is invalid under the Privileges and Immunities Clause of the Fourteenth Amendment (A. 154-55); and (iv) the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment.[7] A. 155.

In holding Ordinance No. 33 invalid as a tax unrelated to the use of facilities at the Airport, the trial court confirmed its findings of fact that the charge "does not otherwise have any valid or reasonable basis for its imposition only upon enplaning passengers upon commercial aircraft" and that the "charge is, in reality, a condition of departure from Dress Memorial Airport into interstate commerce." A. 151. This holding further affirmed the court's finding that the collection of a charge like the one imposed by the Ordinance "would impose a heavy burden upon the interstate air commerce conducted by plaintiff airlines to the detriment of their business, with resulting adverse affect [*sic*] upon the air commerce in the United States." A. 152-53.

2. *The Indiana Supreme Court,* as noted at pp. 3-4 *supra,* based its decision entirely on Commerce Clause grounds. The court viewed the issue on appeal to be whether the act of enplanement on commercial aircraft is reasonably related to the use of the facilities at the Airport for which the one dollar charge is

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[7] The trial court also held the imposition of the one dollar charge to be unconstitutional under Article I, Section 23 of the Indiana constitution. A. 154-55. The state Supreme Court did not deal with the validity of the charge under the Indiana constitution.

levied. A. 202. In considering this issue, the court relied heavily upon decisions of this Court stating the rule that the classification used for the assessment of such fees "must embody a uniform, fair, practical standard bearing a reasonable relationship to the use of state facilities." A. 202, *citing Hendrick* v. *Maryland,* 235 U.S. 610 (1915). On the basis of these decisions, the court held that the tax imposed by Ordinance No. 33 "is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207.

There was no specific discussion in the Supreme Court opinion of the trial court's conclusion (A. 154) that the Ordinance is invalid as an intrusion by the District upon the exclusive power of the Federal Government to regulate an aspect of interstate commerce requiring national uniformity; the holding of the Supreme Court implicitly affirmed this conclusion, however, since the test for reasonable relation to use, viewed by that court as the only issue on appeal, bears primarily on whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate interstate commerce. *See National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 756 (1957), cited by the Supreme Court at A. 202.

SUMMARY OF ARGUMENT

I.

It is evident that the levy imposed by Ordinance No. 33, despite its designation as "user and service charge," is to be judged for constitutional purposes as a tax levied for the act of enplanement, and thus in effect upon the act of departure from the locality.

See A. 151. This characterization of the charge was confirmed by both the trial court and the Indiana Supreme Court. The petitioners themselves have conceded that the incidence of the charge imposed by Ordinance No. 33 is on the act of enplanement of passengers on aircraft of respondent carriers. Brief for Petitioners at 41. The wording of the Ordinance leaves no doubt that this is correct, since it specifically charges respondent airlines "with the responsibility of collecting" the charge from enplaning passengers. No tax is payable by any passenger, regardless of his purchase of a ticket for departure, or his use of Airport facilities, unless he actually enplanes at the Airport. A. 148.

There is no question, moreover, "that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce," since the overwhelming majority of persons departing from the Airport on respondent airlines enplane for ultimate destinations beyond the state. A. 201-02; *see* A. 144. *See Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (loading of ships is "essentially a part of the commerce itself").

It is well established that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of interstate commerce that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954). As recognized below, taxes or fees of any amount whose incidence falls on an integral aspect of interstate commerce are invalid because there are no standards by which the reasonableness of the tax can be measured. This Court struck down a Nevada head tax remarkably similar to the one imposed by Ordinance No. 33

in the leading case of *Crandall* v. *Nevada,* 6 Wall. 35 (1868). The Court emphasized in *Crandall* that the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling, cumulative burdens on interstate travel.

II.

As a tax on interstate commerce, the charge imposed by Ordinance No. 33 represents a violation of the Commerce Clause that cannot be justified as a valid user charge. This was recognized by the Indiana Supreme Court holding "that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207.

Ordinance No. 33 and the Stipulation of Facts, as well as the Findings of Fact of the trial court, plainly show that the charge is levied arbitrarily and capriciously without any reference to actual use of Airport facilities by scheduled carriers or their enplaning passengers. The Ordinance exempts the majority of persons using the Airport (deplaning passengers, private aviators, visitors and others), even though the use of the Airport facilities by this majority of exempted persons is no different from the use of such facilities by enplaning commercial airline passengers who are subject to the charge (A. 151).

The tax imposed by Ordinance No. 33 is not justified by the cases permitting highway user charges on motor carriers, or where license fees are imposed in the exercise of state police powers to regulate highway use, as in *Sprout* v. *City of South Bend,* 277 U.S. 163 (1928), since the Ordinance makes no attempt to

relate the amount of the exaction to the amount of actual use. The charge imposed by the Ordinance may be further differentiated from state highway user fees in that it is measured by and collected from occasional travelers using commercial carriers. There is a great difference between state user taxes on commercial carriers and a checkerboard of airport head taxes which could be imposed on millions of individual airline passengers in varying amounts and under diverse conditions by more than 500 state and local authorities. *See* Brief for National League of Cities as Amicus Curiae at 2. These head taxes would have to be calculated not only by the carriers and their passengers, but also by every vendor of airline tickets in the United States. *See* A. 152-53.

It is not enough for the District to argue, as it does in this case, that the Airport's facilities are essential for the safety, comfort and convenience of commercial airlines and their passengers and that the District needs the money to pay for them.[8] The mere disclosure of a deficiency in the District's budget cannot take the place of the showing required by this Court that the charge bear a reasonable relationship to actual use by enplaning passengers. Indeed there appears to be no instance in which this Court has ever sustained an attempt of a state to impose a charge measured by passengers of a commercial carrier without a showing that the charge is reasonably related to the use of state facilities by the passenger. *See Interstate Transit Inc.* v. *Lindsey,* 283 U.S. 183 (1931); *see also Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 561 (1950) (appendix to dissenting opinion of Frankfurter, J.).

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[8] *See* Brief for Petitioners at 21.

Ordinance No. 33, furthermore, cannot be sustained under the state's police or taxing powers, since there is no possible contention that the Ordinance qualifies as a measure to protect the life, labor, health or property of its citizens, or its power to exact fair compensation for facilities and services provided by it. *See Ness Produce Co.* v. *Short,* 263 F. Supp. 586, 588 (D. Ore. 1966), *aff'd per curiam,* 385 U.S. 537 (1967).

Ordinance No. 33 is also invalid as a tax levied discriminatorily against interstate commerce. The operating incidence of the Ordinance falls almost exclusively on a single class of persons, almost all of whom are traveling in interstate commerce. It is clear from the record that exempted groups using the Airport include a substantial number of persons whose activities have no interstate ramifications and who are not required to pay the fee imposed by the Ordinance or any similar exaction.

III.

Even if the exaction imposed by Ordinance No. 33 were not struck down on other grounds, the tax would still be invalid as an intrusion of the state into an aspect of interstate commerce requiring national uniformity and therefore lying within the exclusive jurisdiction of Congress. *See Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945). The need for uniformity is confirmed by the obvious dangers which the uncontrolled multiplication of state charges of the type at issue would present to the free flow of interstate commerce. Since the power to impose a charge on enplanement cannot logically be distinguished from the power to impose such an exaction on deplanement, arrival and departure taxes of different amounts could be levied at each point of intermediate stopover or

transfer on a passenger's route, and the total effect on the cost of air transportation could be prohibitive.

It is apparent that this everchanging hodgepodge of charges might seriously affect the fare structures set by the Civil Aeronautics Board, and would certainly burden the airlines with a heavy, if not impossible, responsibility for the collection of the charges. *See* A. 50-51, 152. This is not an imaginary threat, but is evident from the proliferation of state and municipal proposals to impose airline head taxes over the past ten years as outlined in Appendix B at pp. 53-54 *infra,* and from the estimate that such taxes could be imposed on scheduled air carriers by some 500 local authorities. *See* Brief for National League of Cities as Amicus Curiae at 2.

IV.

It would appear reasonable for this Court to apply the same standards for protection of the individual's right of interstate travel under the Commerce Clause as are now applied for protection of this right under other provisions of the Federal Constitution, since the Commerce Clause has traditionally been closely associated with the right to travel. *See, e.g., Minnesota Rate Cases,* 230 U.S. 352, 400 (1913), *citing Candall* v. *Nevada, supra.* As an infringement of the right of interstate travel, Ordinance No. 33 fails to meet the tests of compelling state interest and demonstrated lack of alternatives required by this Court in the two leading right-to-travel cases of *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963). The burden of proving the exaction's validity, under *Sherbert,* is upon the District, which in the present case has been unable to show any such justification for the tax.

ARGUMENT

ORDINANCE NO. 33 IS REPUGNANT TO THE COMMERCE CLAUSE SINCE IT IS AN INTRUSION BY THE STATE INTO AN ASPECT OF INTERSTATE COMMERCE REQUIRING NATIONAL UNIFORMITY AND THE TAX IMPOSED THEREUNDER PLACES AN UNDUE BURDEN ON INTERSTATE COMMERCE WHICH CANNOT BE JUSTIFIED AS A VALID USER CHARGE OR EXERCISE OF STATE POLICE POWER OR BY A COMPELLING GOVERNMENTAL INTEREST

Both of The Questions Presented as stated in the Brief of Petitioners (at 2) relate to whether the District has the right under the Commerce Clause to impose user charges or service fees on persons using facilities furnished by the District. These questions have been consolidated in this brief (p. 2 *supra*), since neither the courts below nor the respondents have contended that the District does not have the right to impose proper user charges. The issue in this case is whether the *particular provisions of Ordinance No. 33* establish a valid user charge or whether, as the courts below unanimously held, those provisions fail to conform to all of the Commerce Clause standards for a valid user charge as enunciated in the decisions of this Court.

A. The Operating Incidence of Ordinance No. 33 Is Upon the Passenger and the Act of Departure

There is no dispute that the incidence of the charge imposed by Ordinance No. 33 is upon the act of enplanement of passengers upon respondent carriers' aircraft. The Ordinance specifically states that the tax must be paid "for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport." Moreover, the Ordinance specifically charges respondent airlines "with the responsibility of collect-

ing" the charge from enplaning passengers.[9] No tax is payable by any passenger, regardless of his purchase of a ticket for departure, or his use of airport facilities, unless such passenger actually enplanes at the Airport. A. 148. No tax is payable by a carrier unless and until a passenger enplanes on its aircraft regardless of the use of airport facilities by the carrier or the passenger, and even then the amount payable depends on the number of passengers enplaning rather than on use by the carrier. Both the trial court and the Indiana Supreme Court confirmed this characterization of the charge, the latter specifically holding that "the tax is on the act of enplanement." A. 202.

The petitioners have agreed in this Court that the incidence of the charge is on the act of enplanement, repeatedly emphasizing that the Ordinance "does not place [imposition of the charge] upon the airlines, but their enplaning passengers."[10] Based upon this circumstance, it is clear that the levy imposed by Ordinance No. 33, notwithstanding its designation as a "user and service charge" imposed on the passenger, is to be judged for constitutional purposes as an exac-

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[9] As observed at p. 9 *supra*, the requirement of Ordinance No. 33 that the charge be collected directly from the passenger is the major difference between the tax in this case and the one involved in *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n, supra*. In the *Northeast* case, the statute imposed the charge on the carriers which were authorized to pass it on to the passengers. N.H. REV. STAT. ANN. § 422:43.

[10] Brief for Petitioners at 41. The Indiana Supreme Court recognized, in any event, that a fee or tax imposed on the carrier but measured by the number of passengers is no different from a direct exaction upon the passengers themselves, and thus whether the form of the tax is one imposed on the carrier or the passengers is of no legal significance. *See* A. 207, *citing Henderson* v. *Mayor of New York*, 92 U.S. 259 (1876).

tion levied for the act of enplanement, and thus in effect upon the act of departure from the locality.[11] *See* A. 151.

B. The Tax Falls on an Integral Aspect of Interstate Travel and Therefore Is Invalid

1. The Incidence of the Tax Falls on Interstate Commerce

The Indiana Supreme Court held "[t]here is no question that the incidence of the tax imposed by Ordinance No. 33 falls on interstate commerce," since over 88 percent of the persons who depart from the Airport on respondent airlines enplane for ultimate destinations beyond the state. A. 201-02; *see* A. 144. Although the petitioners express some uneasiness with this holding,[12] they do not seriously contend that it is unjustified; indeed petitioners have based almost their entire argument on the assumption that enplaning passengers are in interstate commerce.[13]

As a tax on interstate commerce, the charge imposed by Ordinance No. 33 is invalid since—

> "[i]t is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate commerce, the

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[11] It cannot be doubted that passengers enplaning commercial aircraft intend by so doing to initiate transportation from the point of enplanement to some other place. The very definition of "enplane" is "to board an airplane for purposes of travel." *Webster's Third New International Dictionary* 755 (1961). To tax the act of enplanement, therefore, is in effect to tax the act of departure; the act of enplanement has no independent significance.

[12] *See* Brief for Petitioners at 22.

[13] *See, e.g., id.* at 8-11.

> flow of commerce, that it cannot be realistically separated from it." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954).

Accord, Railway Express Agency, Inc. v. *Virginia*, 347 U.S. 359, 368 (1954).

In *Michigan-Wisconsin* this Court held invalid a Texas statute taxing the occupation of "gathering gas" as applied to an interstate natural gas pipeline company where the incident of taxation was the taking of gas from the outlet of an independent gas plant for the purpose of immediate interstate transmission. It held that the receipt of the gas into the pipeline from a practical point of view was its "taking off" in the carrier's pipeline into commerce. "[I]n reality the tax is, therefore, on the exit of the gas from the State." 347 U.S. at 167. The situation is the same with respect to the case at bar. The enplanement of departing commercial air passengers at New Hampshire airports "cannot realistically be separated" from taxiing to the runway, takeoff, and landing in another state. Therefore, a tax on the act of enplaning is in reality a tax on departure from the state and is invalid under the Commerce Clause.

Similarly, in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 433 (1947), this Court held invalid the application of an apportioned state gross receipts tax to stevedoring on the ground that loading of vessels is "essentially a part of the commerce itself." The holding was based on the premise that "transportation by water is impossible without loading and unloading" and that "the movement of cargo off and on the ship is substantially a continuation of the transportation." 330 U.S. at 426, *citing* Justice Cardozo's opinion in *Puget Sound Stevedoring*

Co. v. *State Tax Commission,* 302 U.S. 90, 92 (1937). It is apparent that enplanement of passengers also is "essentially a part of the commerce itself" since transportation by air is impossible without loading and unloading the aircraft. This conclusion is confirmed by the general rule stated in *Carter & Weekes* that—

> "[t]he transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself." 330 U.S. at 427-28.

It is thus evident that enplanement is just as much an aspect of interstate commerce as taxiing to the runway or takeoff.[14] Certainly there is a much closer relation-

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[14] *See* note 11 at p. 20 *supra.* The petitioners therefore have little basis for relying on this Court's decisions upholding state sales and use taxes for the proposition that the incidence of the charge is based on the use of airport facilities before enplaning passengers have entered interstate commerce. *See* Brief for Petitioners at 22. These taxes have been sustained because they are "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, 58 (1940). Sales and use taxes have long been "properly differentiated from a direct imposition on interstate commerce," *Freeman* v. *Hewit,* 329 U.S. 249, 257 (1946), and petitioners have no argument that Ordinance No. 33 should be considered as falling into the "consumption tax" category. *See* Brief for Petitioners at 22.

Similarly, petitioners have no justification for drawing an analogy between Ordinance No. 33 and cases upholding state taxes on *local* manufacture, *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932), or taxes on the franchise to conduct a business in the state, *Maine* v. *Grand Trunk Ry.,* 142 U.S. 217 (1891) (5-4 decision), or nondiscriminatory state gross receipts taxes on *local* activities, *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340 (1944). *See also Western Union Tel. Co.* v. *Kansas ex. rel. Coleman,* 216 U.S. 1 (1910) (implicitly questioning *Grand Trunk*).

ship between enplanement and interstate travel than there is between enplanement and use of airport facilities, which latter relationship petitioners suggest should justify Ordinance No. 33 as a user fee.[15]

2. The Tax Is Invalid Because There Are No Standards by Which Its Reasonableness Can Be Measured

It is well established that taxes or fees of any amount whose incidence falls on an integral aspect of interstate commerce are invalid because there are no standards by which the reasonableness of the tax can be measured. Therefore, sustaining the power to tax at all would imply that a state could tax at will and completely interdict the activity.

> "The same power that may impose a tax of two cents per ton on coal carried out of the State, may impose one of five dollars. Such an imposition whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines . . . . It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial inter-

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[15] The recognition that enplanement is an aspect of interstate commerce by the Indiana Supreme Court is an essential difference between the reasoning of its decision and that of the New Hampshire Supreme Court in *Northeast Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n*, n. 8 *supra*. Although the New Hampshire court conceded that the incidence of the charge depends upon the enplanement of passengers, the court went on to characterize enplanement as "an event which is wholly *intrastate*." 273 A.2d at 678 (emphasis added).

course between States remote from each other may be destroyed." *Case of the State Freight Tax,* 15 Wall. 232, 276, 280 (1873).

In considering the question of validity of a local tax on interstate passengers, the lodestar has long been *Crandall* v. *Nevada,* 6 Wall. 35 (1868) in which this Court struck down a Nevada head tax strikingly similar to that imposed by Ordinance No. 33.[16] There the State of Nevada sought to levy a tax of one dollar upon every person leaving the state by railroad, stagecoach or other vehicle engaged in transporting passengers for hire. In holding the Nevada statute to be unconstitutional, the majority of the Court in *Crandall* declined to rely upon the Commerce Clause on the ground that Congress had not yet passed any laws which would be inconsistent with the tax imposed by the state. *See* 6 Wall. at 43. Instead, the majority rested its holding upon the requirements of the federal system itself, from which the Court derived a right to travel from state to state without interruption. *See* 6 Wall. at 48-49, *citing Passenger Cases,* 7 How. 283 (1849). However, two of the justices in *Crandall* concurred solely on the basis of the Commerce Clause, taking the position that the Nevada statute was inconsistent with the power conferred upon Congress to regulate interstate commerce. 6 Wall. at 49. The justification for deciding a case like *Crandall* on the basis of the Commerce Clause, as well as on protection of the right to travel, is even stronger today than a century ago, since interstate air transportation of passengers is now a

[16] *Crandall* is discussed in more detail in the context of the right-to-travel issue in the Brief for Appellants at 27-29 in *Northeastern Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* Docket No. 70-212, the New Hampshire head tax case now before this Court.

highly regulated activity as to which there has been a clear expression of congressional intent. *See* discussion at pp. 39-41 *infra*.[17]

The flaw discovered by the Court in the Nevada statute was not the amount of the tax, but the very assertion of the right to levy an exaction of that character, which bears as directly on the validity of the tax under the Commerce Clause as on the right-to-travel issue.

> "[I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." 6 Wall. at 46.

The apprehended evils underlying the Court's decision in *Crandall* are clearly present in Ordinance No. 33. If the states are empowered to tax the act of departure, no inherent limits exist as to the cumulative amounts of such charges. Clearly the power to tax the act of departure, even where the exaction is small, encompasses the power to prohibit departure completely and to impose crippling cumulative burdens

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[17] The reference in the Brief for Petitioners at 30-31 to *Minnesota Rate Cases*, 230 U.S. 353, 402 (1912) is misplaced; since the paragraph cited by the District is prefaced by a series of "limitations," including the specific condition that—

> "the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, . . . *or upon persons or property in transit* in interstate commerce. *Passenger Cases; Crandall* v. *Nevada; State Freight Tax Case.*" 230 U.S. at 401 (full citations omitted and emphasis added).

on interstate travel, and this is so whether the charge, based on passenger enplanements, is paid by the airlines or by the passengers. *Crandall* v. *Nevada,* 6 Wall. 35, 46 (1868); *Case of the State Freight Tax,* 15 Wall. 232, 276 (1873). The right of the airport of departure to tax the act of enplanement cannot logically be distinguished from the right of the airport of arrival to tax the act of deplanement. By the same token, arrival and departure taxes could be levied by airports at each point of intermediate stopover or transfer on a passenger's route. Since no rational basis exists for apportioning the right to tax arrival and departure among the various airports through which a traveler might pass, there is nothing to prevent the accumulation of crippling burdens on interstate air travel.[18] *See* Appendix B at pp. 53-54 *infra.*

C. The Exaction Imposed by Ordinance No. 33 Cannot Be Justified as a Valid User Charge

The Supreme Court of Indiana, after a thorough review of the facts in this case, held that "it is clear . . . the tax imposed by Ordinance No. 33 is not rea-

[18] To take a single example, a one dollar enplanement fee at Evansville, Indiana, and a one dollar deplaning fee at Louisville, Kentucky would increase the cost of air travel (the present coach fare is $18) between these two points by more than 11 percent. The increase would be even greater were either airport to charge a higher fee. In either case the impact on the competitive position of air transportation between these points would clearly be substantial. This danger was recognized in *Joseph* v. *Carter & Weekes Co.,* 330 U.S. 432, 429 (1947), discussed at pp. 21-23 *supra,* in which this Court observed that, at least in part, "the multiple burden on interstate transportation from taxation of . . . [loading] arises from the possibility of a similar tax for unloading." *See also Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 170 (1954) (invalidating tax on "taking" of gas into pipeline since upholding such an exaction would permit tax on arrival in another state).

sonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause]." A. 207. This holding was entirely in accord with the conclusions of law and findings of fact of the trial court on the Commerce Clause issue.

1. A State Exaction on Interstate Commerce Must Bear a Reasonable Relation to Use of State Facilities

The basic principle relied upon by the Indiana Supreme Court, reaffirmed by this Court in *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753, 756 (1967), is that state taxation falling on interstate commerce "can only be justified as designed to make such commerce bear the fair share of the cost of the local government whose protection it enjoys."[19] The court recognized that the mere fact the taxing authority denominates the tax as a "use and service charge" does not settle the question whether the tax in fact is reasonably related to use of its facilities. *Ibid.* Relying upon this Court's decision in *Hendrick* v. *Maryland,* 235 U.S. 610, 624 (1915), the court observed that fees collected for the use of state facilities must be levied according to a "uniform, fair, and practical standard." A. 202. As the court said, moreover, the formula or classification used by the taxing authorities for the assessment of such taxes must bear a reasonable relation to the use of its facilities, *McCarroll* v. *Dixie Greyhound Lines, Inc.,* 309 U.S. 176

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[19] *See Freeman* v. *Hewit,* 329 U.S. 249 (1946). *See also Bode* v. *Barrett,* 344 U.S. 583 (1953); *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U.S. 495 (1947); *Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542 (1950).

(1940), in order to assure that interstate commerce bears only the burden of fair compensation for intrastate activities incidental to it.[20] *See Interstate Transit, Inc.* v. *Lindsey,* 283 U.S. 183 (1931); *Sprout* v. *City of South Bend,* 277 U.S. 163 (1928).

The District concedes that state taxation of interstate commerce is limited to an amount corresponding to a "just share of the state tax burden" by those engaged in interstate commerce. Brief for Petitioners at 23. The tonnage cases relied upon by petitioners, even though based on the Tonnage Duty Clause of the Constitution[21] rather than on the Commerce Clause, are generally consistent with the principle developed under the Commerce Clause that a state exaction on interstate commerce must bear a reasonable relationship to the use of its facilities. In *Huse* v. *Glover,* 119 U.S. 543, 548 (1886), cited by petitioners, this Court made clear that the exaction of tolls for passage through locks or for wharfage will be upheld only where it is shown to be "compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream." The tolls in *Glover* were imposed upon *all* users of state-improved locks according to the tonnage of the vessels and the amount of freight carried by them, and the Court concluded that such tolls constituted a reasonable user charge rather than a tonnage duty which is specifically prohibited by the Constitution. *Accord, Packet Co.* v. *Keokuk,* 95 U.S. 80 (1877) (case discussed in *Glover*

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[20] *See also Northwest Airlines, Inc.* v. *Joint City-County Airport Bd.,* 154 Mont. 352, 463 P.2d 470 (1970).

[21] ART. I, § 10, cl. 3, which prohibits the imposing of a tonnage duty by any state without the consent of Congress.

upholding charge proportioned on tonnage for use of wharfage facilities).[22]

2. Ordinance No. 33 Bears No Relation to Use of Airport Facilities

Measured against these constitutional standards, Ordinance No. 33 cannot be justified as a user fee, and the Indiana courts were correct in reaching this conclusion. The Ordinance and the Stipulation of Facts, as well as the trial court's findings of fact, clearly show that the charge is levied arbitrarily and capriciously without any reference to actual use of Airport facilities by scheduled air carriers or their enplaning passengers. The respondents concede that interstate commerce should be expected to "pay its own way," but they reject the notion of any tax such as that imposed by the Ordinance which is not reasonably related to use of Airport facilities in accordance with long-established constitutional principles.

First, the charge imposed by Ordinance No. 33 on the number of enplaning passengers bears no reasonable relationship to their actual use or nonuse of the

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[22] Although the question was not specifically discussed by the Court in these early cases, it was evident even then that the tonnage of vessels and the amount of their freight probably were thought to bear a reasonable relationship to the use of locks and wharfage facilities, since it is plain that larger and heavier vessels draw more water, occupy greater space, and require more elaborate facilities (such as larger locks and more secure berths).

It is interesting that the measure for the landing fees charged respondent airlines by the District bears some similarity to the tonnage measure approved in *Glover* and related cases, in that such landing fees are graduated according to the cumulative weight of the aircraft. See Appendix C at pp. 55-57 *infra*.

facilities at the Airport. The trial court found that the majority of persons using the Airport (deplaning passengers, private aviators, visitors and others) are exempted from the payment of the one dollar service charge and that the use of the Airport facilities by this majority of exempted persons is no different from the use of such facilities by enplaning commercial airline passengers who are subject to the charge. A. 151. Indeed, all persons (including enplaning airline passengers) who use facilities at the Airport already pay some type of direct or indirect user charge for the facilities actually used by them. A. 151-52. The trial court found that enplaning passengers do not make use of *any* significant facilities or services at the Airport which are not also used by a numerically larger group of other persons who are not subject to payment of the one dollar charge imposed by the Ordinance. A. 152.

Second, even if Ordinance No. 33 could be considered to impose a user charge on the carrier rather than on the passenger (a proposition which, as noted above, is contrary to the terms of the Ordinance and to basic constitutional principles), the imposition of a charge based on the number of enplaning passengers bears no reasonable relationship to use of Airport facilities by the carrier. Each flight operation (takeoff or landing) by commercial air carriers makes certain use of runways, taxiways, landing aids and other similar facilities, regardless of the number of passengers aboard the plane, for which the respondent carriers compensate the District by payment of landing fees and other charges. Similarly, the carriers occupy specified portions of the Airport terminal, and pay

rent therefor in accordance with lease agreements, regardless of the number of enplaning passengers.[23] A. 137-42; *see* Appendix C at pp. 55-57 *infra*. Even the leases entered into between the District and the respondent carriers specifically contemplate that the charges paid thereunder will fully compensate the District for the actual use of Airport facilities by the carriers and their passengers. These agreements state that "[n]o rentals, fees, license, excise or operating taxes, tolls or other charges" except those provided in the leases, shall be charged against or collected from the carriers directly or indirectly for the privilege of the use of Airport facilities. A. 142.

These arbitrary and discriminatory features of the exaction illustrate that the fee imposed by Ordinance No. 33 has none of the characteristics of a charge imposed on use of airport facilities. It is apparent from decisions of this Court that to vary the charge payable by the carrier or its passengers for the use of runways, taxiways, landing aids and other similar facilities by the number of passengers carried is in effect to base the fee on the assumed earning capacity of the flight, and thus impermissibly, on the privilege of doing an interstate business. *See Interstate Transit, Inc.* v. *Lindsey,* 283 U.S. 183, 187 (1931) (invalidating a state privilege tax on an interstate bus line based on carrying capacity of the buses).

Although petitioners argue that the charge is no different from state highway user taxes, the Ordinance differs significantly from such fees, which are measured on a basis bearing a relationship to the amount of

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[23] In addition to these local charges, respondent carriers are subject to federal user taxes, some of which are used to finance facilities at the Airport. *See* note 4 at p. 7 *supra*.

the carriers' use of the highways, and which are designed to insure payment by all users. Where these characteristics are absent fees on interstate carriers have been held invalid.[24] That is exactly the situation in the present case, where the statute, by exempting all Airport users other than enplaning passengers, manifests no purpose to exact fair compensation from all who use Airport facilities. It is not sufficient for the District to maintain, as it does in this case, that the Airport facilities are primarily designed for the safety, comfort and convenience of commercial airlines and their passengers and that the District needs the money to pay for them.[25] The mere cataloguing of a deficit

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[24] In *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940), for example, this Court held invalid an Arkansas tax imposed on the amount of gasoline in excess of twenty gallons carried by a motor vehicle entering the state. The Court reasoned that such a factor could have no reasonable relation to a fair charge for the use of the highways, since large use without compensation was possible by the very terms of the statute. The facts showed that most vehicles could traverse the state using no more than twenty gallons of gasoline. The excess carried could, therefore, have no relation to highway use.

[25] *See* Brief for Petitioners at 21. Petitioners have plainly misread the Montana Supreme Court's opinion in *Northwest Airlines, Inc.* v. *Joint City-County Airport Bd.*, 154 Mont. 352, 463 P.2d 470 (1970) in attempting to distinguish the case on the premise that the court found no need for revenues to maintain and operate the Helena Airport. *See* Brief for Petitioners at 26-27. It is true that the court said "[t]here is no *issue* before the court as to the need for revenue," 463 P.2d at 475 (emphasis added), but the context makes clear that the court meant there was no *doubt* as to the airport's revenue needs. The court specifically stated:

> "*There is a need for revenue to support the Airport* . . . . However, even if legislation such as [that imposing the airport service charge] seeks to achieve good and necessary ends, it must do so in a fashion not impinging on constitutional rights." *Ibid.* (emphasis added).

in the District's budget will not serve as a substitute for a showing that the charge bears a reasonable relationship to actual use by enplaning passengers, particularly where the Ordinance itself demonstrates an intent to utilize the proceeds of the tax for the benefit of "all users" of the Airport.

Admittedly, in the case of highway use charges imposed on motor carriers, the courts have permitted a certain degree of approximation in the method of apportionment and, where license fees are imposed in the exercise of the states' police powers to regulate highway use, have permitted impositions of flat fees designed to defray the expenses of such regulation. *Sprout* v. *City of South Bend,* 277 U.S. 163 (1928). The power of the states to impose special fees on motor carriers for the privilege of using the highways has been attributed, in great part, to (a) the unusual destruction of the highways occasioned by heavy motor vehicles, *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs,* 332 U.S. 495 (1947), and (b) the fact that "common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use," *Clark* v. *Poor,* 274 U.S. 554, 557 (1927). These decisions do not justify the tax imposed by Ordinance No. 33, which makes no attempt to establish a reasonable relationship between the amount of the exaction and the amount of actual use of Airport facilities. A. 151.

The charge imposed by Ordinance No. 33 further differs from state highway user taxes in that it is measured by and collected from occasional travellers using commercial carriers. It is conceded that some 35 other states referred to by petitioners may now be permitted

to collect highway user taxes under a variety of classifications and formulas, even though as a result one commercial carrier may have to compute such taxes in 35 different ways. *See* Brief for Petitioners at 38-39. However, these exactions are vastly different from the diverse head taxes which could be imposed on millions of individual airline passengers in varying amounts by hundreds of state and local authorities. *See* Brief for National League of Cities as Amicus Curiae at 2. These head taxes, each with its own peculiarities of incidence, would have to be computed not only by the carriers and their passengers, but also by every vendor of airline tickets in the United States. *See* A. 152-53.

In any case, the latitude permitted the states in devising means of assuring that interstate commerce pay its own way traditionally has not been as great where the question involved is the interstate movement of persons rather than of goods. As this Court has long maintained, the right of a state to charge an interstate motor carrier for the use of its highways, where such a carrier makes continuous use of the highways and where the state's entire highway system is open to such use, does not imply that the state has similar power in regard to the occasional traveller.[26]. The state's power to levy such charges has been particularly limited in the case of the occasional traveller using a commercial carrier rather than a vehicle under his own control. Indeed there appears to be no decision in which this

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[26] "[W]e do not mean to imply that the constitutional rule relating a state's power to collect for the use of its roads by occasional travellers is as broad as where roads used by common carriers are involved." *Capitol Greyhound Lines* v. *Brice*, 339 U.S. at 545 n.5, *citing Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U.S. 495, 503 (1950) and the opinions in *Edwards* v. *California*, 314 U.S. 160 (1941).

Court has sustained an attempt of a state to impose a charge measured by passengers of a commercial carrier without a showing that the charge is reasonably related to use of state facilities by the passengers. *See Interstate Transit, Inc.* v. *Lindsey,* 283 U.S. 183 (1931); *see also Capitol Greyhound Lines* v. *Brice,* 339 U.S. 542, 561 (1950) (appendix to dissenting opinion of Frankfurter, J.).

D. Ordinance No. 33 Is Invalid as an Intrusion by the State Into an Aspect of Interstate Commerce Requiring National Uniformity and Therefore Within the Exclusive Jurisdiction of Congress

Even if the exaction imposed by Ordinance No. 33 were held to be a proper user charge, the tax would still be invalid as an invasion of the exclusive authority of Congress to regulate interstate commerce. It is a basic principle of constitutional law that the states are without power "to regulate those phases of the national commerce which, because of the need of national uniformity demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 (1945); *see Bibb* v. *Navaho Freight Lines, Inc.,* 359 U.S. 520 (1959); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196 (1885); *Welton* v. *Missouri,* 91 U.S. 275 (1876); *Cooley* v. *Board of Port Wardens,* 12 How. 299 (1851). Even where Congress has not exercised its undoubted right to preempt the field by enacting legislation, the states are barred from regulating those subjects affecting interstate commerce which require uniform national regulation.

The holding of the Supreme Court of Indiana implicitly relied upon this basic principle, in that the main purpose of the relation-to-use test applied by the

court is to determine whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate interstate commerce. *See National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U.S. 753, 756 (1967), cited by the court at A. 206.

1. Interstate Passenger Traffic Requires Uniform National Regulation

It has repeatedly been held that interstate passenger traffic is a subject demanding uniform national regulation. *Bowman* v. *Chicago & Northwestern Ry. Co.,* 125 U.S. 465 (1888); *Case of the State Freight Tax,* 15 Wall. 232 (1873); *Crandall* v. *Nevada,* 6 Wall. 35 (1868). The need for uniformity is demonstrated by the manifest dangers which the uncontrolled multiplication of state legislation of the type at issue would present to the free flow of interstate commerce. It must be emphasized that the source of constitutional concern does not lie so much with the magnitude or immediate impact of the challenged enactment itself, but rather with the propensity of such enactments as a class to conflict with national policies. Here, as in *Crandall,* the challenged exaction is relatively small in amount, but if such an exaction be upheld there exists the possibility of crippling effects on interstate passenger traffic from the multiplication of such charges and from the imposition of taxes of larger amounts. The power to impose a one dollar exaction on enplanement cannot be logically distinguished from the power to impose such a tax on deplanement, or even a tax of five or ten dollars, each one of which standing alone might well be considered reasonable.

By the same token, arrival and departure taxes could be levied at each point of intermediate stopover or transfer on a passenger's route. If Indiana may tax

enplanement, Illinois may tax deplanement, and California may tax a plane change. If each may charge one dollar, then each may charge any amount. *See* Appendix B at pp. 53-54 *infra*. If such levies were imposed by each airport along a traveller's route, the total effect on the cost of air transportation could be prohibitive, the competitive structure of air carriers could be affected, and air transportation, compared to other forms of transportation, could be seriously impaired.

The result would be an everchanging hodgepodge of charges that might significantly alter effective fare structures approved by the Civil Aeronautics Board and would certainly impose on the airlines a heavy, if not impossible, burden of collecting the charges. *See* A. 50-51, 152-53.[27] This threat is not an ephemeral one, but is clearly evident from the numerous state and municipal proposals to impose airline head taxes over the past ten years as outlined in Appendix B at pp. 53-54 *infra*; *see* Brief for National League of Cities as Amicus Curiae at 2. Moreover, if head taxes are

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[27] For example, Ordinance No. 33 exempts from the charge members of the U.S. armed forces and passengers whose flights terminate or require intermediate or temporary stops at the Airport (A. 39), while the statute imposing an airport head tax in New Hampshire contains no such exemption for passengers enplaning at airports in that state (N.H. REV. STAT. ANN. § 422:43). This kind of inconsistency in the head taxes would make their collection by the airlines even more difficult and would further add to the inequities inherent in such exactions. *See* Comment, *Airport "Service Charges" and the Constitutional Barriers to State Taxation of Airport Users*, 43 Colo. L. Rev. 79, 102-03 (1971). The result might be to compel every airline ticket agent and travel agent in the United States and abroad selling airline transportation for this country to be familiar with the intricacies of the head tax procedures in each state or city imposing such a tax in order to issue tickets with the correct fare. *See* A. 51, 152-53.

upheld on airline passengers, the way would obviously be open for the imposition of similar taxes on interstate travel by means of railroads, buses, ferries and other forms of public transportation.[28]

Where state statutes have threatened multiple burdens on interstate commerce, this Court has uniformly found them to be repugnant to the Commerce Clause. *E.g., Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888); *Case of the State Freight Tax*, 15 Wall. 232 (1873).

With the sole exception of the New Hampshire Supreme Court in the *Northeast* case, *supra*, state courts have in the last two years consistently struck down as unconstitutional various airport head taxes similar to the one imposed by Ordinance No. 33. See the discussion of these cases at pp. 8-10 *supra*. In addition, at least four legislative proposals for similar head taxes have been abandoned in the face of opinions of state or local officials that they were unconstitutional. *See* note 5 at p. 9 *supra*, and Appendix B at pp. 53-54 *infra*.[29]

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[28] One hardly need look back to the castles on the Rhine and the Loire and the hazardous overland routes to the Far East in order to measure the power of the tolltaker on interstate transportation. *See* Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 Yale L. J. 219, 228 (1957).

[29] The District is on precarious ground in relying (Brief for Petitioners at 39) on Justice Cardozo's statement in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 587 (1937) to the effect that it will be time enough to mark the limits to a state's power to frame a system of taxation when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. The Court based its holding in *Henneford* on the fact that the taxing statute by its framework specifically avoided the danger of multiple

2. Ordinance No. 33 Conflicts With Federal Policies Demanding Uniform National Regulation of Air Transportation

The degree to which the imposition of such uncoordinated charges by each state and locality throughout the United States interferes with the need for uniform national regulation is even clearer in the present case than in *Crandall*. For, while at the time of *Crandall* there was no national regulation of interstate stagecoach traffic, interstate air transportation of passengers is a highly regulated activity as to which there has been a clear expression of congressional intent that air transportation and policies pertaining thereto be governed by the national interest. The Federal Aviation Act of 1958, 49 U.S.C. § 1302, charges the Civil Aeronautics Board with the responsibility of regulating air carriers so as to foster "the encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States," "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges" and "the

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taxation through the use of an offsetting allowance for taxes imposed by other states. In the present case, however, it is apparent that numerous state and city authorities are fully prepared to impose head taxes on deplaning as well as on enplaning passengers (*see* Appendix B at pp. 53-54 *infra*) and that they have thus far been deterred from doing so almost entirely on the basis of long-standing constitutional principles enunciated by this Court.

The size of the reservoir of potential head taxes, on airline passengers alone, is evident from the suggestion by the National League of Cities that at least 500 publicly owned airports receiving scheduled airline service would be prepared to impose a "passenger service fee" if the decision below is reversed. Brief for National League of Cities as Amicus Curiae at 2-5. Surely one should not interpret Justice Cardozo's maxim as meaning that this Court is obliged to wait for the dike to give way before shoring up the constitutional defenses against such an ominous threat to interstate commerce.

regulation of air transportation in such manner as to . . . foster sound economic conditions in, such transportation, . . . and coordinate transportation by, air carriers."

There is no doubt, as the District observes, that Congress has for some time expected state and local authorities to provide a substantial portion of the financing for their airport facilities. Brief for Petitioners at 15-16. Respondents have never argued that Congress has preempted the field of construction and maintenance of airport facilities. Nor have they contended that local government should become the unpaid servants of interstate commerce. Respondents' position is simply that other means of taxing users of airport facilities could be devised which do not make travel itself the incident which is taxed and which are not arbitrary or discriminatory in their application.[30] *See* pp. 45-46 *infra*. It is apparent that the District does not appreciate the difference in effect on interstate commerce between the inclusion of a single federal user tax in the ticket price of all commercial airline passengers and the imposition of a jumble of airport head taxes on such passengers by hundreds of state and local authorities. *See* Brief for Petitioners at 26.

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[30] This position is fully supported by *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954), relied on by the District (Brief for Petitioners at 25), in that the Court there emphasized that airlines may be required to pay only a "nondiscriminatory share of the tax burden." 347 U.S. at 598. The airline in that case did not allege that the state statute discriminated against it, nor did it challenge the reasonableness of the apportionment prescribed by the statute. *Ibid.* Perhaps more important, the ad valorem tax upheld in *Braniff* was imposed on property of the carrier, and not on its interstate passengers as in the present case.

To develop and maintain a system of air transportation consonant with the foregoing criteria, the federal regulatory agencies must allocate economic burdens and advantages among the carriers, among classes of users and among parts of the country. The ability of federal regulation to accomplish the goals set for it by congressional mandate, would be fatally impaired if each local authority could distort the economic balance of interstate air transportation by the imposition of taxes like that involved in the present case.[31] Even where Congress has not explicitly removed the subject from state regulation by "occupying the field," "[t]he power of Congress to grant protection to interstate commerce against state regulation or taxation . . . or to withhold it . . . is so complete that its ideas of policy should prevail." *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (citations omitted); *see California* v. *Zook*, 336 U.S. 725, 729 (1949).

E. Ordinance No. 33 Cannot Be Justified Under the State's Police or Taxing Powers

Where a state's enactment clearly falls upon or regulates an aspect of interstate commerce it is "valid, if

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[31] Indiana has legislatively acknowledged the need for uniform regulation and the eminence of the Federal Government in this regard. The declaration of purpose of the Aeronautics Act, Indiana Code 1971, 8-21-1-2, Burns Ind. Ann. Stats., § 14-313, reads in part as follows:

> "It is hereby declared that the purpose of this act is to further the public interest and aeronautical progress . . . by establishing uniform regulations, consistent with federal regulations and those of other states, in order that those engaged in aeronautics of every character may so engage with the *least possible restriction*, consistent with the safety and the rights of others." (Emphasis added.)

at all, only where the state acts under its inherent police power to protect the life, liberty, health or property of its citizens," *Ness Produce Co.* v. *Short,* 263 F. Supp. 586, 588 (D. Ore. 1966), *aff'd per curiam,* 385 U.S. 537 (1967), citing *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960), or under its power to exact fair compensation for facilities and services provided by it. Otherwise the state is powerless to burden interstate commerce.

No possible contention could be raised in this case that Ordinance No. 33 is an exercise of the police powers of the state. Since the exaction imposed by the Ordinance has no reasonable relationship to the use of the airport facilities, the fee is clearly a revenue-raising measure. As such it faces a heavier burden of justification. "Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." *Freeman* v. *Hewit,* 329 U.S. 249, 253 (1946). Thus, the tax imposed by the Ordinance is in effect nothing more than a charge for the very privilege of travelling between the states and violates the rule that "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 113 (1943).

F. Ordinance No. 33 Is Not Justified by a Compelling Governmental Interest

It would seem appropriate that the Court apply the same standards for protection of the individual's right of interstate travel under the Commerce Clause as for

protection of this right under other provisions of the Federal Constitution. The decisions of this Court have often woven together the lines of cases decided under the Commerce Clause with those based on other constitutional provisions giving rise to the right to travel. *See, e.g., Minnesota Rate Cases,* 230 U.S. 352, 400 (1913), relied upon by petitioners, which draw upon right-to-travel cases like *Crandall* v. *Nevada* as well as Commerce Clause decisions such as *Case of the State Freight Tax* for the proposition that a state cannot impose a tax upon persons or property in transit in interstate commerce. The constitutional basis for the right to travel, apart from the Commerce Clause, is discussed in more detail in the Brief for Appellants at 26-39 in *Northeastern Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* Docket No. 70-299, now before this Court.

The standards currently being applied by this Court for protection of the individual's right of interstate travel were carefully set out in *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), holding unconstitutional the one-year residence requirements imposed by several states and the District of Columbia as a prerequisite to eligibility for welfare benefits.[32] The Court held in *Shapiro* that any classification which serves to penalize the exercise of the right of an individual to travel from state to state, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. 394 U.S. at 634. This requirement of a showing of a "compelling governmental interest" to justify state legislation had previously been applied in cases where the state enactment tended to infringe First Amend-

[32] *See* Brief for Appellants at 39 in *Northeastern Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* Docket No. 70-212.

ment rights. *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 439 (1963). By thus extending it in *Shapiro* to the right to travel, the Court spotlighted the importance of that right and the extreme degree to which it is to be insulated from state action tending to impair its free exercise. At the same time, the Court brought state regulation or taxation affecting the right to travel under the rule that, where regulation must be justified on grounds of compelling state interest, "it would be plainly incumbent on [the state] to demonstrate that no alternative forms of regulation would [serve such interest]." *Sherbert* v. *Verner,* 374 U.S. 398, 407 (1963). The burden of proving the exaction's validity, under *Sherbert,* is upon the state.

No state or local interest has been, or could be, demonstrated that would necessitate raising needed revenues for the District in the particular fashion embodied in Ordinance No. 33. Under the rule of *Shapiro,* the compelling interest of the state must be in precisely the features of the enactment that are constitutionally challenged. In the case of the Ordinance these are (a) that the exaction falls on the act of enplanement, (b) that it falls directly on the passenger, and (c) that it is imposed arbitrarily and discriminatorily on enplaning commercial passengers and not on others similarly situated with respect to the use of airport facilities. None of these features is necessary to the goal of providing increased airport revenues; there is a less restrictive alternative to each such feature of the tax.

The District has no compelling interest in having the exaction fall on the act of enplanement or directly on the passenger. As previously discussed, the respond-

ent airlines are already subject to various charges relating to their use of the Airport, including rentals and landing fees for the use of Airport facilities. The economic burden of such rentals and charges, in turn, enters equitably into the ticket charges paid by all passengers of respondent airlines. *See* A. 152. Passengers and other users of Airport facilities may in addition bear indirectly, at least in part, the economic burdens of rentals and fees charged concessionaires at the Airport. A. 55-57, 151-52. Other aircraft operators similarly bear certain taxes and charges related to the use of the Airport facilities. *See, e.g.,* A. 55. It would seem likely that other means of taxing passengers and other users of airport facilities could also be devised which would not make travel itself the incident which is taxed and which would not be arbitrary or discriminatory in their application.[33]

G. Ordinance No. 33 Is Levied Discriminatorily on Interstate Passengers and Therefore Is Invalid as a Measure That Effectively Discriminates Against Interstate Commerce

Regardless of its validity on other grounds, a state exaction or regulation that effectively discriminates against interstate commerce is invalid under the Commerce Clause. *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1963); *Memphis Natural Gas*

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[33] *See* Levine, *Landing Fees and the Airport Congestion Problem,* 12 J. Law & Econ. 79, 85-87 (1969). Moreover, the presence of alternatives which could constitutionally raise equal quantities of revenue from the same source does not justify the exaction imposed by Ordinance No. 33. *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602, 608 (1951); *McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327, 330 (1944). On the contrary, the availability of such alternatives demonstrates the lack of a compelling state interest in the actual scheme of incidence and classification embodied in the existing statute.

Co. v. *Stone,* 335 U.S. 80 (1948); *Nippert* v. *City of Richmond,* 327 U.S. 416 (1946). Whether an exaction works a discrimination against interstate commerce is to be determined by an examination of its actual operation. "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-56 (1940); *see Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1963).

Examination of the operating incidence of Ordinance No. 33 shows that it falls exclusively on a class of passengers some 88 percent of whom are travelling in interstate commerce. A. 49. It is insufficient to argue, as do petitioners, that the Ordinance does not discriminate against interstate commerce merely because it is applied as equally to intrastate enplaning passengers as to interstate enplaning passengers. *See* Brief for Petitioners at 31. What makes the Ordinance discriminatory is that the majority of users of Airport facilities who are not subject to the payment of any equivalent charge includes a substantial number of persons whose activities are purely *intrastate.* In particular, these include a significant number of civil aviators and passengers, as well as non-passenger users of the Airport facilities. A. 46-48; *see* note 3 at p. 6 *supra.*

The statute is no less discriminatory against interstate commerce because it may affect a small number of intrastate passengers or because it is not levied against all interstate passengers. It is enough that it is levied discriminatorily on a single group that consists predominantly of interstate passengers, and thus

is discriminatory in its application or effect. *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946).[34]

The same circumstances which make Ordinance No. 33 a violation of the Commerce Clause because of its discriminatory impact on interstate commerce bring the Ordinance into conflict with the Equal Protection Clause of the Fourteenth Amendment. The classifications of persons subject to and exempt from the "use and service charge" of the Ordinance "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

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[34] The numerous state highway user tax cases cited by petitioners are in accord with these principles. *See* Brief for Petitioners at 31-38. In the leading Indiana cases, the state Supreme Court generally affirmed the standards set down by this Court that classification of highway users in a highway user tax statute will be sustained only "if the discrimination is founded upon a *reasonable* distinction, or . . . if any state of facts can *reasonably* be conceived to sustain it." *Richmond Baking Co.* v. *Department of Treasury*, 215 Ind. 110, 18 N.E. 2d 778 (1938) (emphasis added); *see Kersey* v. *City of Terre Haute*, 161 Ind. 471, 473, 68 N.E. 1027 (1903). Many of these Indiana cases were also cited in petitioners' briefs below. Nonetheless, the Indiana Supreme Court was unanimous in holding the tax imposed by Ordinance No. 33 to be unconstitutional.

Similarly, in the leading Ohio cases, the state Supreme Court made clear that the constitutionality of a highway user tax depends on whether it is discriminatory against or imposes a burden on interstate commerce, as well as whether the tax bears a reasonable relationship to the purpose for which it was created. The court did not say that *any* state purpose for a highway user tax would be upheld; the court implicitly limited the field to situations in which "there is a reasonable relationship between the tax and the use." *George F. Alger Co.* v. *Bowers*, 166 Ohio St. 427, 429, 143 N.E. 2d 835, 837 (1957); *see Kaplan Trucking Co.* v. *Bowers*, 114 Ohio App. 429, 182 N.E. 2d 862 (1961).

It should be observed that *none* of the federal or state cases cited by petitioners upheld a tax measured by and imposed upon individual passengers of commercial carriers.

F. S. Royster Guano Co. v. *Virginia,* 252 U.S. 412, 415 (1920). *Accord, Rinaldi* v. *Yeager,* 384 U.S. 305, 309 (1966). *See* Brief for Appellants at 56-59, *Northeastern Airlines, Inc.* v. *New Hampshire Aeronautics Comm'n,* Docket No. 70-212, which is now before this Court.

CONCLUSION

The opinion of the Supreme Court of Indiana below concluded by saying:

> "It is clear and we so hold that the tax imposed by Ordinance No. 33 is not reasonably related to the use of the facilities which benefit from the tax, and is, therefore, an unreasonable burden on interstate commerce in violation of [the Commerce Clause] of the United States Constitution." A. 207.

The judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: December 27, 1971

APPENDIX A

Statutes Involved

1. United States Constitution, ART. I, § 8, cl. 3 (Commerce Clause):

> "The Congress shall have power . . .
>
> (3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;".

2. Ordinance No. 33, Evansville-Vanderburgh Airport Authority District, February 26, 1968:

ORDINANCE NO. 33

AN ORDINANCE ESTABLISHING AND FIXING A USE AND SERVICE CHARGE FOR ALL ENPLANING PASSENGERS UTILIZING AIRPORT PREMISES AND FACILITIES.

WHEREAS, the Acts of the Indiana General Assembly, 1959, Chapter 15, Section 30, provides that the acquiring, establishment, construction, improvements, equipment and maintenance and the control and operation of Airports and landing fields for aircraft under and pursuant to the Act creating the Evansville-Vanderburgh Airport Authority District, shall and are hereby declared to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all of the people of the State of Indiana, as well as all of the people residing in the District of said Board, the same being coterminous with the boundaries of Vanderburgh County, Indiana; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District was duly created under and pursuant to the terms and provisions of the Acts of the Indiana General Assembly, 1959, Chapter 15, and upon its creation and establishment, said Airport Authority District assumed the responsibility for the care, construction, improvement, equipment, maintenance and control of the Dress Memorial

Airport located in Evansville, Vanderburgh County, Indiana; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District is empowered, pursuant to said Acts of the Indiana General Assembly, to enact ordinances for the purpose of adopting a schedule of rates and charges and to collect the same from all users of facilities and services provided by said Dress Memorial Airport; and

WHEREAS, the Evansville-Vanderburgh Airport Authority District, pursuant to said Acts of the Indiana General Assembly, has the further power to fix, charge and collect rentals, tolls, fees and charges to be paid for the use of the whole or any part or parts of said Dress Memorial Airport and to fix, charge and collect fees for public admissions and privileges; and

WHEREAS, the Board of Evansville-Vanderburgh Airport Authority District has determined, upon investigation, that the use of said Airport and its various facilities is enjoyed by persons and taxpayers not only residing in Vanderburgh County, Indiana, but by numerous persons residing outside the jurisdiction of said District who do not directly contribute toward the support, construction, improvement, equipment, maintenance and control of said Airport and its facilities; and

WHEREAS, the Board of said Airport Authority District has determined that there exists a need for additional revenue with which to defray the continued and future costs of construction, improvement, equipment and maintenance of said Airport so as to provide for the reasonable safety, convenience and comfort of enplaning passengers using the facilities of Dress Memorial Airport; and

WHEREAS, the Board of said Evansville-Vanderburgh Airport Authority District, after due and deliberate consideration, has determined that the responsibility for the support, construction, improvement, equipment and maintenance of said Airport and its facilities, lies and should be shared

more equally by all those persons who enjoy and use its facilities and services;

NOW, THEREFORE, BE IT RESOLVED by the Board of Evansville-Vanderburgh Airport Authority District as follows:

Section 1. Commencing on July 1, 1968, there is hereby fixed, created and established a use and service charge of One Dollar ($1.00) for each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport.

Section 2. Each commercial airline now or hereafter operating commercial aircraft to and from the Dress Memorial Airport is hereby charged, together with its various agents and travel agencies, servants, employees and representatives, with the responsibility of collecting said use and service charge.

Section 3. Said commercial airlines are hereby further directed to remit to Evansville-Vanderburgh Airport Authority District all the use and service charges so collected:

(a) for the period commencing July 1 and terminating December 31 of each year, on or before January 31 next following said six month period;

(b) for the period commencing January 31 and terminating June 30 of each year, on or before July 31 next following said six month period.

Said remittances shall be based upon the number of enplaning passengers at Dress Memorial Airport as hereinabove described in Section 2 of this Ordinance, times the use and service charge of One Dollar ($1.00), less six percent (6%) of all amounts so collected, which percentage is hereby allocated and allowed to said airlines for the purpose of defraying the administrative costs of collecting and remitting said use and service charge.

Section 4. The term "each passenger enplaning any commercial aircraft operated from the Dress Memorial Airport" shall not include, nor shall the use and service charge

hereby created, apply to any active members of the United States Armed Forces enplaning aircraft at the Dress Memorial Airport, or any person purchasing an airline ticket having, as an initial point of departure, a locality other than Dress Memorial Airport, and whose flight either terminates or requires an intermediate or temporary stop at Dress Memorial Airport.

Section 5. All revenue collected from said use and service charges shall be held by the Evansville-Vanderburgh Airport Authority District in a separate fund for the purpose of defraying the present and future costs incurred by said Airport Authority in the construction, improvement, equipment, and maintenance of said Airport and its facilities for the continued use and future enjoyment by all users thereof.

Section 6. If any provision or clause of this Ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Section 7. This Ordinance shall be in full force and effect upon its passage and approval by the Board of Evansville-Vanderburgh Airport Authority District as provided by law, and shall remain in full force and effect until amended, modified or revoked by the Board of said District.

PASSED by the Board of Evansville-Vanderburgh Airport Authority District on this 26th day of February, 1968, and on said day signed by the President and attested by the Secretary of Evansville-Vanderburgh Airport Authority District.

/s/ KENNETH C. KENT
Kenneth C. Kent, President

ATTEST:

/s/ ROBERT M. LEICH
Robert M. Leich, Secretary

APPENDIX B

Table of Airport Head Taxes on Commercial Airline Passengers Proposed or Adopted in Various States From 1962 to 1971 and Their Present Status

State	Description of Charge	Present Status *
California		
City of Los Angeles	$1.00 for each person *arriving* or *leaving* by commercial aircraft.	Proposal abandoned in face of opinion of City Attorney, dated September 12, 1962, that tax would be unconstitutional.
State of California	$.50 for each person *departing* on an airline.	Bill (SB 211) passed Senate on May 12, 1971 but head tax provisions subsequently deleted by Assembly.
Hawaii	$2.00 for each person *arriving* by commercial aircraft.	Proposal abandoned in face of April 10, 1969 opinion of State Attorney General that tax would be unconstitutional.
Indiana		
Evansville-Vanderburgh Airport Authority District	$1.00 for each passenger *enplaning* on commercial aircraft.	Held unconstitutional by Supreme Court of Indiana, December 23, 1970. Certiorari granted by this Court, October 12, 1971 (Docket No. 70-99).

* See pp. 8-10 *supra* for more detailed citations to cases and opinions of state and local officials regarding constitutionality of these taxes.

State	Description of Charge	Present Status
Montana	$1.00 for each passenger *enplaning* on commercial aircraft.	Held unconstitutional by Supreme Court of Montana, January 5, 1970.
New Hampshire	$1.00 for each passenger *enplaning* on large commercial aircraft and $.50 for each passenger *enplaning* on scheduled flights of small aircraft.	Held constitutional by Supreme Court of New Hampshire, January 29, 1971. Jurisdiction noted by this Court, October 12, 1971. (Docket No. 70-212). Tax being paid into court pending outcome of case.
New Jersey	$.50 for helicopter passengers, $1.00 for domestic passengers and $2.00 for overseas passengers *enplaning* on commercial carriers.	Held unconstitutional by Superior Court of New Jersey, April 21, 1970 (appeal dismissed).
New York	$1.00 for each passenger *arriving* or *departing* from each airport.	Bill (S. 1337) introduced in Senate on January 15, 1969 typical of proposals made from time to time but not adopted as yet.
North Carolina		
Raleigh-Durham Airport	Tax (amount unstated) on each passenger *boarding* airplane.	Proposal abandoned in face of October 31, 1968 opinion of State Attorney General that tax would be unconstitutional.
Washington		
Spokane County	Charge (amount unstated) on each passenger *boarding* an airplane.	Proposal abandoned in face of March 5, 1962 opinion of State Attorney General that charge would be invalid.

APPENDIX C

Rentals and Fees Provisions (Article VII) of Delta Air Lines Lease With Evansville-Vanderburgh Airport Authority District

The following is an extract from the Lease Agreement between Delta Air Lines, Inc. and the Evansville-Vanderburgh Airport Authority District, dated August 8, 1966, which was included as Exhibit 1 (at R. 492) to the Stipulation of Facts submitted by the parties to the Vanderburgh Superior Court but was omitted in the printing of the joint Appendix in this case. *See* A. 65. This extract, which sets forth Article VII (Rentals and Fees) of the Lease Agreement, is virtually identical to comparable provisions in the Lease Agreements between the District and the other respondent carriers:

ARTICLE VII—RENTALS AND FEES

Lessee agrees to pay Lessor for the use of all premises, facilities, rights and licenses granted hereunder commencing on and effective the 1st day of September, 1965, the following rentals, fees and charges:

(1) *Rental with Respect to the Administration Building Space.* From and after the commencement date of the term hereof, rental for Lessee's exclusive Administration Building space shall be:

1102 square feet of ticket counter and back office space at the rate of $4.31 per square foot per annum	$4,749.62
381 square feet of canopy space at the rate of $1.43 per square foot per annum	$ 544.83

(2) *Rental for space other than the Administration Building.*

1000 square feet of fuel tank farm facilities, as more fully designated and delineated on Exhibit "B" attached hereto and made a part hereof, at the rate of $0.045 per square foot per annum	$ 45.00

(3) *Landing Fees.* From and after the commencement date of the term hereof for all other premises, facilities, rights, licenses, services and privileges granted hereunder, except those for which rentals are specifically provided elsewhere herein, shall be combined in and represented by a landing fee to be charged against the approved maximum landing weights at the Airport of the Lessee's Scheduled Trip Arrivals each month as follows:

10¢ per 1,000 pounds for the first 5,000,000 pounds per month of scheduled approved maximum landing weight.

9¢ per 1,000 pounds for the next 5,000,000 pounds per month of scheduled approved maximum landing weight.

8¢ per 1,000 pounds of scheduled approved maximum landing weight in excess of 10,000,000 pounds per month.

The timetables of Lessee, as filed with the Civil Aeronautics Board in effect on the first day of each calendar month (a copy of which shall be furnished to the Lessor's Airport Manager each month) shall be the sole basis for determining the number, type and weight of each Scheduled Trip Arrivals operated during such month, and no account shall be taken of schedule changes made during such month resulting from any cause, or of the actual number, type and weight of trip arrivals of aircraft landings occurring during such month, or of flight cancellations, extra sections flown, shuttle, courtesy, test, training, inspection, emergency, special, charter, sightseeing, or other flights. The number of trips shown on the face of such timetable as scheduled to arrive at the Airport during such month, multiplied by the applicable approved maximum landing weights for each type of aircraft, shall be the basis for computing such landing weights, provided that, in the event that said timetables and schedules of Lessee indicate that Lessee has scheduled operations on less than a daily basis, then such flight operations shall be treated as one-

thirtieth (1/30th) of a daily scheduled flight in calculating the monthly landing charge.

The term "approved maximum landing weight" for any aircraft, as used herein, shall be the maximum landing weight approved by the Federal Aviation Agency for landing such aircraft at the Airport.